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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 513

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN LIVESTOCK COMMISSION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 28) is reported in 28 F. (2d) 63.

QUESTION PRESENTED

The Producers Commission Association is a co-operative marketing corporation, operating on the Oklahoma City stockyards. In proceedings under the Packers and Stockyards Act, the Secretary of Agriculture found that the appellees, operating as market agencies in these yards, had combined to boycott the Producers Commission Association by declining to purchase from or sell to it livestock, and

ordered them to desist from this discriminatory practice. It appeared that under its articles of incorporation the Producers Commission Association had no corporate power to handle livestock not produced by its members. When charged with discriminatory practice, the appellees contended that the Producers Commission Association was exceeding its corporation power by handling cattle of nonmembers.

The questions presented by this appeal are whether, either in the proceedings before the Secretary of Agriculture or in this suit in the District Court, brought by the appellees to enjoin the enforcement of the Secretary's order, the burden was on the Government to prove that the livestock sold or offered for sale by the Producers Commission Association was the product of its members, or was upon the appellees to show the contrary, when attempting to justify or excuse their boycott on the ground that the Producers Commission Association was acting *ultra vires*.

A further question in the case is whether the Producers Commission Association became an outlaw and not entitled to the protection afforded by the Packers and Stockyards Act against unjust discrimination as to its lawful business, conducted within the limits of its corporate authority, in selling and handling cattle received by it from its members, because in some respects it may have exceeded its corporate authority by purchasing, or attempting to purchase, nonmembers' livestock.

STATUTES INVOLVED

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159 (U. S. c. Title 7, Secs. 201, 205, 207, 208, 213, 215, 217) defines market agencies and sets forth their obligations and duties as follows:

> SEC. 301. When used in this Act—
>
> * * * * *
>
> (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and
>
> (d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.
>
> SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard.
>
> SEC. 306 (f). After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand,

or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 312 (a). It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

Contended by Rep - contends not broad enough reach Packers to deal with them

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 314 (a). Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

An Act of the State of Oklahoma of March 19, 1923 (c. 181, Session Laws of Oklahoma, 1923), amending Sections 5598 to 5621 (Art. XVI of Chap. 34), Compiled Oklahoma Statutes, 1921, is stipulated as a part of the record (R. 27).

Relevant portions of the Compiled Statutes, as so amended, are as follows:

SEC. 5599. Any number of persons, not less than five, engaged in the production of agricultural or horticultural products, may act together and organize cooperative associations, not having capital stock and not conducted for profit, for mutual help in collectively processing, preparing for market, picking, storing, shipping, handling, and marketing such products of persons so engaged; and the manufacturing or the making of the by-products thereof; or in the financing of any of the above activities; and may have marketing agencies in common with other like or similar associations; and such associations and their members may make all necessary contracts and agreements to effect such purposes; and such association may make advances to members, and such members may hire, rent, or buy their farm supplies and machinery from or through the association; Provided, that such association shall be operated for the mutual benefit of the members thereof, only as such producers; and no member of the association shall have more than one vote because of the membership capital he may own therein; and such associations shall not pay dividends on membership capital in excess of eight per centum per annum. And cooperative associations, not having capital stock, now existing in Oklahoma, exercising, or attempting to exercise, corporate rights and powers, or to perform duties as a cor-

poration, for the purpose or any of the purposes aforesaid, are hereby validated, and are granted all of the rights and powers, and subjected to all of the restrictions and limitations, of this Act, as herein amended; and are granted for the enforcement of existing as well as subsequent contracts, all of the rights and remedies herein provided.

SEC. 5600. An Association, in processing, preparing for market, handling and marketing such products of persons so engaged which shall include any by-products thereof as well, may, in addition to all other powers given by this Act, and to effect the purposes of this Act, pledge, hypothecate, mortgage, market or sell any such products as effectively as may be done by the member or members owning same, or such association may acquire title thereto and pledge, hypothecate, mortgage, market and sell the same.

SEC. 5603. * * * the Association shall have power within the limitations of this Act:

* * * * *

(e) To purchase, lease or receive by gift, bequest, or devise and to hold personal and real property necessary in the conduct of its operations and to dispose of same; and to process, prepare for market, handle, pledge, hypothecate, mortgage, market or sell any and all such products mentioned in Sections 2 and 3 of this Act, or to acquire title thereto and to process, manufacture, can, pick, store,

ship, prepare for market, handle, pledge, hypothecate, mortgage, market or sell the same and the action of the Association in pledging, hypothecating, mortgaging, encumbering, marketing, or selling any such products, shall be conclusive on any and all members of the Association.

SEC. 5608. No Association organized hereunder shall handle the agricultural or horticultural product of any nonmember except for storage.

Section 5293 (Article I of Chap. 34), Compiled Oklahoma Statutes, 1921, provides as follows:

> The due incorporation of any company, claiming in good faith to be a corporation under this chapter, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had, and action brought, at the suit of the State, in the manner prescribed in civil procedure.

STATEMENT

This suit was brought by the appellees under Section 316 of the Packers and Stockyards Act, to restrain the enforcement of an order of the Secretary of Agriculture directed against certain marketing agencies and dealers on the Oklahoma City stockyards, requiring them to discontinue a boycott against the Producers Commission Association, a marketing corporation operating on that yard.

The proceeding before the Secretary of Agriculture was initiated May 18, 1925, by a complaint and notice of hearing. (R. 12–15.) The appellees (R. 15) answered, testimony was taken before an examiner, and oral argument presented to the Secretary, whereupon he issued his findings of fact, conclusions and order of March 31, 1926 (R. 16), in which the complaint was dismissed as to certain respondents, and the others were ordered to—

> cease and desist from engaging in and using any unfair or unjustly discriminatory practices or devices in connection with the buying and selling of livestock in commerce as defined in said packers and stockyards act at the Oklahoma National Stock Yards, to the prejudice and disadvantage of the Producers Commission Association and of the Bollinger & Spencer Live Stock Commission Company, at the Oklahoma National Stock Yards at Oklahoma City, Oklahoma, in violation of Title III of said act (1) by failing or refusing to buy livestock from or sell livestock to said Producers Commission Association and the Bollinger & Spencer Live Stock Commission Company in the ordinary course of business or to enter into any business relations with them with respect thereto, while at the same time engaging in and carrying on business freely among themselves; (2) by combining or agreeing among themselves to refrain from buying livestock from or selling livestock to the Producers Commission

Association and the Bollinger & Spencer Live Stock Commission Association; and (3) in any other manner shown by the record. (R. 21.)

Thereupon these appellees brought this suit to restrain the enforcement of the order, claiming (1) that the Secretary's findings were not supported by competent evidence, (2) that the alleged boycott was not in violation of law, and (3) that the boycott, if it existed, was justified as to the Producers Commission Association, because the latter was exceeding its corporate powers by handling livestock of others than its members.

At the hearing in the District Court the record of the testimony and proceedings before the Secretary was the only evidence introduced. Counsel for the United States, while not conceding the invalidity of the Secretary's order in any respect, consented to its modification as to Jean Pryor and Claude Allen, and as to dealings with the Bollinger & Spencer Livestock Commission Company, since these parties had gone out of business for reasons not related to the boycott, and as to them the order had no practical operation. (R. 26.) Modification was similarly consented to in so far as the order might be construed to prohibit individual acts or conduct of the plaintiffs unrelated to any concert or agreement among them. (R. 27.)

The question submitted to the court below thus concerns only the validity of the order in so far as it forbade agreements among the remaining plain-

tiffs to refuse dealings with the Producers Commission Association.

The District Court held that there was substantial evidence to support the findings of the Secretary of Agriculture that the stockyard was a public stockyard as defined in Title II of the Act, that certain of the plaintiffs against whom the Secretary's order was directed were market agencies or dealers, and it further held that there was evidence to support the finding of the Secretary that the plaintiffs were engaged in concert in unfair and unjustly discriminatory practices in violation of the Act, by persistently refraining from and refusing to handle, buy or sell "livestock there from the Producers Commission Association, a cooperative market agency." (R. 29.) It stated (R. 30):

> We are satisfied that there was substantial evidence to support the findings of the Secretary. The acts of the plaintiffs and the circumstances were amply sufficient to show the plaintiffs had combined to boycott the association and make their object effective by their concerted action.

The District Court nevertheless enjoined the enforcement of the Secretary's order, on the ground that the Producers Commission Association was acting beyond its corporate powers in handling livestock the product of nonmembers.

In preparing the record for this appeal only the findings of the Secretary were made part of the record and the evidence before him was omitted

by stipulation because not material to the consideration of the only question presented by the appeal. (R. 26.) The stipulation states (R. 27):

> That the record contains no evidence as to whether the livestock which the Producers Commission Association bought or sold or attempted to buy and sell upon the Oklahoma City Stockyards was or was not the livestock of its members.
>
> That the record contains no evidence as to whether the limitation in the corporate powers of the Producers Commission Association imposed by the law under which it was organized was or was not the reason motivating the plaintiffs' alleged combination to boycott said association, as referred to in the opinion of the district court.

There being no evidence as to whether the livestock dealt in by the Producers Commission Association came from its members, the District Court held (R. 31):

> No testimony has been pointed out as to the transactions of the association, except that its manager and salesman bought and sold livestock at the yard, and none that they sold livestock of the members of the association. It was incumbent on the Government to show its right to engage in these transactions.

Proceeding on the assumption that the burden of proof, both before the Secretary and in the District Court was upon the Government to show affirma-

tively that the livestock handled by the Producers Commission Association came from its members and that its acts were therefore not *ultra vires*, the District Court assumed that *all* of its transactions were *ultra vires* and that it was not entitled to the protection of the Packers and Stockyards Acts for the conduct of *ultra vires* transactions, and it thereupon enjoined the enforcement of the order in its entirety. There is no direct finding by the Secretary of Agriculture and no direct statement in this record that the Producers Commission Association made purchases of livestock on the stockyards from other commission houses and market agencies, but the inference to be derived from the Secretary's order and Paragraph IV of the stipulation (R. 27) is that the Association not only sold livestock on the stockyards, but purchased or attempted to make purchases of livestock from other market agencies or commission houses, and we concede that to be the fact. Whether such purchases were to fill orders from members who wanted livestock to stock their farms is not disclosed.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

These points covered by the assignments of error (R. 33) and which we desire to press in this Court may be summarized as follows:

I. The District Court erred in holding that either in the hearing before the Secretary or in the District Court the burden was upon the Government to negative the allegation that the Pro-

Stores Commission Association was acting ultra vires and in holding that the burden was upon the Government to establish affirmatively that the livestock sold and offered for sale by the Producers Commission Association on these stockyards came from members.

II. The court below erred in assuming, in the absence of evidence, that all or any substantial part of the livestock sold or offered for sale by the Producers Commission Association came from nonmembers.

III. The court below erred in holding, in effect, that if the Producers Commission Association exceeded its corporate powers by purchasing livestock from other commission houses it became an outlaw and was not entitled to any protection under the Stockyards Act with respect to its authorized business in selling and handling and marketing livestock received from its members.

IV. The District Court erred in enjoining the enforcement of the order of the Secretary of Agriculture in its entirety and in failing to leave the order in operation in so far as it ordered these appellees to desist from their boycotting of the Producers Commission Association's authorized corporate business of handling, selling, and marketing of livestock received by it from its members.

SUMMARY OF ARGUMENT

There is nothing in this record to support that the boycott of the Producers Commission Association

resulted because that Association was exceeding its corporate powers. For all that appears in the record the defense of the boycott for that reason was an afterthought, originated at the hearing before the Secretary. There may be ground for a contention by the appellant that appellees were not in a position to raise the question of *ultra vires* to excuse the boycott or the discriminatory treatment, but we have no reason to insist that transactions of the Producers Commission Association outside of its corporate power should receive the protection of the provisions of the Packers and Stockyards Act.

The state of the record may require the concession by the United States that, in so far as the Producers Commission Association was engaged in purchasing livestock on the stockyards from other commission houses it was operating in excess of its powers defined in its charter. Whether that is so, depends on the meaning of the word "supplies" in the Oklahoma Statute, Section 5509.

There was no evidence presented at any stage of the proceedings that the livestock which the Association sold or offered for sale on the stockyards was not received from members. It is elementary that the burden of showing that a corporation's transactions are *ultra vires* rests on those asserting it as a defense or as a basis for action. It is elementary that the presumption is always that a corporation acts within the limits of its corporate powers. The decision of the District Court that

the burden rested upon the Government to show affirmatively that the Producers Commission Association was not exceeding its corporate authority by selling livestock received from nonmembers, is without any authority to support it.

The order of the Secretary in so far as it may be construed to forbid a boycott of the Producers Commission Association, in respect of the latter's purchases of livestock from nonmembers, may go too far, but the order is valid in so far as it forbids the boycott of the Producers Commission Association's transactions in handling and marketing livestock received from members. The order of the District Court should have been limited to relieving these appellees from the operation of the order in respect only of *ultra vires* purchases of livestock from nonmembers, and the judgment below is erroneous in so far as it allows a boycott of the Producers Commission Association in the sale by it of livestock in the stockyards.

ARGUMENT

The questions presented by this appeal are within a narrow compass. The Producers Commission Association had corporate power to market the livestock products of its members for the account of members or to "acquire title" to the livestock produced by its members and market and sell the same. (See Section 5600, Compiled Statutes of Oklahoma, above quoted.) It was prohibited from handling the products of nonmembers except for storage.

It was a market agency within the meaning of Section 301(c) of Title III of the Packers and Stockyards Act when engaged in the business of selling livestock at the stockyard on a commission basis. That section does not require that to be a market agency a person must both buy and sell.

It was a dealer within the meaning of Section 301(d) of the Act when engaged in selling at the stockyards livestock the title to which it had acquired from its members. That a cooperative association may operate in marketing its members' products on a stockyard regulated by the Act and is entitled to the protection of the statute against discriminatory practices is expressly recognized by Section 306(f), which, in regulating charges of market agencies operating in stockyards, says that the restrictions of the Act—

> shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock.

Section 312 (a), forbidding discriminatory practices by market agencies and dealers, operates for the protection of other agencies and dealers.

The appellees were found guilty of conspiring to boycott *all* transactions of the Producers Commission Association. That finding, sustained by the decision below, as supported by substantial evidence, must be accepted here. That the Producers Commission Association, if engaged in marketing livestock within the limits of its corporate

authority, was entitled to the protection of the Act and to relief against the boycott is also concluded by the decision below.

The question for consideration on this appeal is the extent to which the Association was committing *ultra vires* acts and the extent to which any *ultra vires* acts deprived it of the protection to its legitimate business afforded by the Packers and Stockyards Act. The record states that no evidence was offered either before the Secretary of Agriculture or in the District Court—

> as to whether the livestock which the Producers Commission Association bought or sold or attempted to buy and sell upon the Oklahoma City Stockyards was or was not the livestock of its members. (Stipulation, Par. IV, R. 27.)

There is nothing in this record and there was nothing, as the stipulation shows, in the record before the trial court to show that the Producers Commission Association was exceeding its corporate power by handling livestock of nonmembers except the fact that it was purchasing or offering to purchase livestock on the stockyards from other market agencies. The fair inference from this fact was that in these purchases the Association was exceeding its corporate authority. Although it had power to purchase the products of its members and acquire title thereto under its articles of incorporation, we are not prepared to assert that such provision in its charter was intended to authorize it to

purchase livestock in the open market from other commission houses and market agencies who were marketing livestock which happened to be the property of members of the Producers Commission Association. The clause in its charter authorizing it to acquire title of members' livestock should, we assume, be construed to authorize only direct purchases from its members, with a view to aiding its members in marketing their products. To this extent the record justifies the conclusion that *ultra vires* acts were being committed.

There is a clause in Section 5599, Oklahoma Statutes (p. 6, supra), that members of an association like the Producers may buy their "farm supplies and machinery" through the association. If livestock for stocking members' farms is covered by the word "supplies," this association was authorized to *buy* livestock to fill orders from members, and in that event none of its acts is shown to be *ultra vires* and our concession would be unjustified and should be disregarded.

There is nothing in the record to justify the conclusion that the livestock marketed and sold by the Producers Commission Association on the stockyards came from nonmembers or, in any event, that all of it had such an origin. It is absurd to assume that a cooperative marketing association, organized for the very purpose of aiding its members to market their products, confines its business to products of nonmembers. The trial court said (R. 31):

> It was incumbent on the Government to show its [Producers Commission Association] right to engage in these transactions.

No authority was cited to support that holding and none can be found. It is elementary that a general presumption of right acting attends a corporation, the effect of which is to place the burden of proof that an act done or contract made was *ultra vires* upon him who alleges that fact as the foundation of his action or defense.

> *Farmers' Loan and Trust Co.* v. *Curtis*, 7 N. Y. 466.
>
> *Chautauque County Bank* v. *Risley*, 19 N. Y. 369.
>
> *Mine and Smelter Supply Co.* v. *Stockgrowers' Bank*, 173 Fed. 859.

A vast array of authority to the same effect is found in American Digest, Century Edition, Vol. 12, Columns 1626-1627. This proposition is not open to debate. It follows that on this record the case must be dealt with as if all of the livestock sold and offered for sale by the Producers Commission Association came from members.

The only remaining question is whether the fact that the Association may have exceeded its corporate power in purchasing livestock on the yards made it an outlaw so as to deprive it of all protection for its legitimate business, and to excuse the boycott in so far as it related to its authorized corporate transactions. We know of no basis for such a contention, and none is offered in the decision below.

It is not clear under the authorities that these appellees were in any position to raise the claim of *ultra vires* or offer it as an excuse for the boycott (see *Railroad Company* v. *Ellerman*, 105 U. S. 166; *Matthew* v. *Pennsylvania R. R. Co.*, 8 Fed. 45; Section 5293, *Compiled Stat. of Oklahoma*, above quoted), but there is no reason to burden this Court with the consideration of that problem. The United States would not be justified in bringing a case to this Court for the purpose of invoking the Packers and Stockyards Act for the protection of business of a marketing agency conducted in violation of its charter and in excess of its corporate authority under the law of its creation.

The record does not suggest that the boycott occurred because the Association was acting *ultra vires* or that the boycotters knew of that before being called to account in the hearing before the Secretary; but if the Producers Commission Association had been detected in the commission of *ultra vires* acts by the purchase of livestock on the yards, that would not justify refusing to deal with it when offering livestock for sale. It had corporate power to sell livestock received from members. Whether it was acting within or without its authority in selling livestock depended upon the source of the livestock. Under such circumstances the Producers Commission Association could not escape the performance of its contracts of sale.

The purchaser would be in no jeopardy. In dealing with efforts of corporations to avoid performance of their contracts, because *ultra vires*, a distinction is sometimes made between contracts entirely and obviously outside the corporate powers, and cases where the contracts within the general scope of the granted powers are *ultra vires* because of some particular circumstances which may not be known to the other contracting party. See *Miners Ditch Co.* v. *Zellerbach*, 37 Cal. 543.

To justify a refusal to buy livestock from such agencies as the Producers Commission Association, having limited powers, because of the possibility of their exceeding their powers by offering livestock obtained from nonmembers, would exclude such cooperative marketing agencies from operating on public stockyards, although their right to do so seems to be expressly recognized by Section 306(f).

The boycott operated against all the business of the Association. The order of the District Court leaves the Association in a position where it is subject to a boycott, although it may confine its business within the limits of its corporate authority. The boycott may continue against its legitimate business,, although as disclosed by the concurring opinions below, it may be open to the Association to amend its charter under the statutes of Oklahoma so as to enable it to broaden its powers and obtain corporate authority to do all that it has done.

We respectfully submit that the judgment below should be reversed, with instructions to the court below to so amend its decree as to permit the enforcement of the order of the Secretary of Agriculture to the extent that it orders the boycott to be abandoned as to the business of the Producers Commission Association in selling livestock and offering it for sale on these stockyards. As the claim of *ultra vires* does not affirmatively appear to have been the motive for the boycott, the decree below should also be amended so as to allow enforcement of the Secretary's order against the boycott, in respect of any business the Association has acquired or may acquire corporate power to transact, by amendment of its articles.

If this Court believes that the clause in Section 5599, Oklahoma Statutes, providing that members of such associations may "hire, rent, or buy their farm supplies and machinery from or through the association" is broad enough to authorize the association to purchase livestock on orders from members, to stock their farms, then the judgment below should be reversed in its entirety.

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FEBRUARY, 1929.